

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

KENNARD LANE, )  
                    )  
Plaintiff,       )  
                    )  
v.                ) Civ. No. 09-939-SLR  
                    )  
WARDEN PERRY PHELPS, et al., )  
                    )  
Defendants.       )

---

Kennard Lane, James T. Vaughn Correctional Center, Smyrna, Delaware. Pro Se Plaintiff.

Ryan Patrick Connell, Deputy Attorney General, Delaware Department of Justice, Wilmington, Delaware. Counsel for Defendants.

---

**MEMORANDUM OPINION**

Dated: August 4, 2011  
Wilmington, Delaware

  
ROBINSON, District Judge

## I. INTRODUCTION

Plaintiff Kennard Lane (“plaintiff”), an inmate at the James T. Vaughn Correctional Center (“VCC”), Smyrna, Delaware, filed this lawsuit pursuant to 42 U.S.C. § 1983. He proceeds pro se and was granted leave to proceed in forma pauperis. Presently before the court is the motion to dismiss of State defendants Perry Phelps (“Phelps”) and Carl Danberg (“Danberg”) (together “defendants”)<sup>1</sup> and plaintiff’s motions to amend.<sup>2</sup> (D.I. 24, 29, 38) The court has jurisdiction pursuant to 28 U.S.C. § 1331. For the reasons discussed, the court will grant the motion to dismiss and deny the motions to amend.

## II. BACKGROUND

Plaintiff alleges that from June 2008 until December 28, 2009, defendants “failed, refused, and delayed to adequately treat” his hernias, causing him moderate to severe chronic pain for which they also “ failed, refused, and delayed adequate treatment or medication.” Plaintiff alleges that defendants were notified and fully aware of the need for treatment and/or surgery. Plaintiff seeks injunctive relief and compensatory damages. (D.I. 4)

Defendants filed a Rule 12(b)(6) motion to dismiss the claims and, in turn, plaintiff filed duplicate motions for leave to amend. (D.I. 24, 29, 38) In addition, plaintiff opposes the motion to dismiss.<sup>3</sup> (D.I. 30, 37)

---

<sup>1</sup>The complaint named several other defendants but only Phelps and Danberg remain, the other defendants having been dismissed. (See D.I. 17, 41)

<sup>2</sup>The motions to amend are identical.

<sup>3</sup>Plaintiff filed duplicate responses to the motion to dismiss. (D.I. 30, 37)

### **III. MOTION TO DISMISS**

#### **A. Standard of Review**

Rule 12(b)(6) permits a party to move to dismiss a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The court must accept all factual allegations in a complaint as true and take them in the light most favorable to a pro se plaintiff. *Phillips v. County of Allegheny*, 515 F.3d 224, 229 (3d Cir. 2008); *Erickson v. Pardus*, 551 U.S. 89, 93 (2007). Because plaintiff proceeds pro se, his pleading is liberally construed and his complaint, “however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.” *Erickson v. Pardus*, 551 U.S. at 94 (citations omitted).

A well-pleaded complaint must contain more than mere labels and conclusions. See *Ashcroft v. Iqbal*, \_\_ U.S. \_\_, 129 S.Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). When determining whether dismissal is appropriate, the court conducts a two-part analysis. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). First, the factual and legal elements of a claim are separated. *Id.* The court must accept all of the complaint’s well-pleaded facts as true, but may disregard any legal conclusions. *Id.* at 210-11. Second, the court must determine whether the facts alleged in the complaint are sufficient to show that plaintiff has a “plausible claim for relief.” *Id.* at 211; see also *Iqbal*, 129 S.Ct. at 1949; *Twombly*, 550 U.S. at 570. In other words, the complaint must do more than allege plaintiff’s entitlement to relief; rather, it must “show” such an entitlement with its facts. A claim is facially plausible when its factual content allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at

570). The plausibility standard “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Id.* The assumption of truth is inapplicable to legal conclusions or to “[t]hreadbare recitals of the elements of a cause of action supported by mere conclusory statements.” *Id.* “[W]here the well-pleaded facts do not permit the court to infer more than a mere possibility of misconduct, the complaint has alleged - but it has not shown - that the pleader is entitled to relief.” *Id.* (quoting Fed. R. Civ. P. 8(a)(2)).

## **B. Discussion**

Plaintiff alleges that he wrote to Danberg and Phelps informing him of his medical condition and lack of treatment, to no avail. Attachments to the amended complaint indicate that plaintiff believed hernia surgery was necessary to stop his chronic pain and that he believed Correctional Medical Services, Inc. (“CMS”) ignored his need for surgery. Defendants move for dismissal on the grounds that the amended complaint does not contain sufficient facts to show they caused plaintiff harm in violation of the Eighth Amendment. More specifically, they argue that, although plaintiff does not explicitly plead the basis for his cause of action against defendants, it appears the claim is based upon a failure to supervise.

### **1. Respondeat superior**

Defendants argue that the complaint fails to allege the requisite personal involvement for a § 1983 claim and is based upon a respondeat superior theory. A defendant in a civil rights action must have personal involvement in the alleged wrongs to be liable, and cannot be held responsible for a constitutional violation which he or she

neither participated in nor approved.” *Baraka v. McGreevey*, 481 F.3d 187, 210 (3d Cir. 2007). “Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence.” *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988). The Third Circuit has reiterated that a § 1983 claim cannot be premised upon a theory of respondeat superior and, that in order to establish liability for deprivation of a constitutional right, a party must show personal involvement by each defendant. *Brito v. United States Dep’t of Justice*, 392 F. App’x 11, 14 (3d Cir. 2010) (not published) (citing *Iqbal*, 129 S.Ct. at 1948-49); *Rode v. Dellarciprete*, 845 F.2d at 1207).

“Because vicarious liability is inapplicable to § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” *Iqbal*, 129 S.Ct. at 1948 (2009). In *Iqbal*, the Supreme Court emphasized that “[i]n a § 1983 suit - here masters do not answer for the torts of their servants - the term ‘supervisory liability’ is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.” *Iqbal*, 129 S.Ct. at 1949. “Thus, when a plaintiff sues an official under § 1983 for conduct ‘arising from his or her superintendent responsibilities,’ the plaintiff must plausibly plead and eventually prove not only that the official’s subordinates violated the Constitution, but that the official by virtue of his own conduct and state of mind did so as well.” *Dodds v. Richardson*, 614 F.3d 1185, 1198 (10<sup>th</sup> Cir. 2010), *cert. denied*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 2150 (2011) (quoting *Iqbal* 129 S.Ct. at 1949). The factors necessary to establish a § 1983 violation will vary with the constitutional provision at issue. *Id.*

Under pre-*Iqbal* Third Circuit precedent, “[t]here are two theories of supervisory liability,” one under which supervisors can be liable if they “established and maintained a policy, practice or custom which directly caused [the] constitutional harm,” and another under which they can be liable if they “participated in violating plaintiff’s rights, directed others to violate them, or, as the person[s] in charge, had knowledge of and acquiesced in [their] subordinates’ violations.” *Santiago v. Warminster Twp.*, 629 F.3d 121, 129 n.5 (3d Cir. 2010) (quoting *A.M. ex rel. J.M.K. v. Luzerne Cnty. Juvenile Det. Ctr.*, 372 F.3d 572, 586 (3d Cir. 2004)) (second alteration in original)). “Particularly after *Iqbal*, the connection between the supervisor’s directions and the constitutional deprivation must be sufficient to demonstrate a plausible nexus or affirmative link between the directions and the specific deprivation of constitutional rights at issue.” *Id.* at 130.

The Third Circuit has recognized the potential effect that *Iqbal* might have in altering the standard for supervisory liability in a § 1983 suit but, to date, has declined to decide whether *Iqbal* requires narrowing of the scope of the test. *Santiago*, 629 F.3d at 130 n.8; see, e.g., *Argueta v. United States Immigration and Customs Enforcement*, 643 F.3d 60, 70 (3d Cir. 2011) (“To date, we have refrained from answering the question of whether *Iqbal* eliminated – or at least narrowed the scope of – supervisory liability because it was ultimately unnecessary to do so in order to dispose of the appeal then before us.”); *Bayer v. Monroe County Children and Youth Servs.*, 577 F.3d 186, 190 n.5 (3d Cir. 2009) (In light of *Iqbal*, it is uncertain whether proof of personal knowledge, with nothing more, provides a sufficient basis to impose liability upon a supervisory official.) Hence, it appears that, under a supervisory theory of liability, and even in light of *Iqbal*,

personal involvement by a defendant remains the touchstone for establishing liability for the violation of a plaintiff's constitutional right.<sup>4</sup> *Williams v. Lackawanna County Prison*, Civ. No. 07-1137, 2010 WL 1491132, at \*5 (M.D. Pa. Apr. 13, 2010).

Facts showing personal involvement of the defendant must be asserted; such assertions may be made through allegations of specific facts showing that a defendant expressly directed the deprivation of a plaintiff's constitutional rights or created such policies where the subordinates had no discretion in applying the policies in a fashion other than the one which actually produced the alleged deprivation; e.g., supervisory liability may attach if the plaintiff asserts facts showing that the supervisor's actions were "the moving force" behind the harm suffered by the plaintiff. See *Sample v. Diecks*, 885 F.2d 1099, 1117-118 (3d Cir. 1989); see also *Iqbal*, 129 S.Ct. at 1949-54; *City of Canton v. Harris*, 489 U.S. 378 (1989); *Heggenmiller v. Edna Mahan Corr. Inst. for Women*, 128 F. App'x 240 (3d Cir. 2005) (not published).

Plaintiff provides no specific facts how defendants violated his constitutional rights, that they expressly directed the deprivation of his constitutional rights, or that they created policies wherein subordinates had no discretion in applying them in a fashion other than the one which actually produced the alleged deprivation. The allegations in the amended complaint do not satisfy the *Iqbal* requirement.

For the above reasons, the court will grant defendants' motion to dismiss.

---

<sup>4</sup>"Supervision' entails, among other things, training, defining expected performance by promulgating rules or otherwise, monitoring adherence to performance standards, and responding to unacceptable performance whether through individualized discipline or further rulemaking." *Sample v. Diecks*, 885 F.2d 1099, 1116 (3d Cir. 1989). "For the purpose of defining the standard for liability of a supervisor under § 1983, the characterization of a particular aspect of supervision is unimportant." *Id.* at 1116-17.

## 2. Medical needs

In addition, defendants argue that the amended complaint fails to identify with any particularity deliberate indifference on their behalf. They further argue that plaintiff seems to allege they are responsible for medical treatment, or the lack thereof, for matters not under their control.

In order to set forth a cognizable medical needs claim, an inmate must allege (i) a serious medical need and (ii) acts or omissions by prison officials that indicate deliberate indifference to that need. *Estelle v. Gamble*, 429 U.S. at 104; *Rouse v. Plantier*, 182 F.3d 192, 197 (3d Cir. 1999). A prison official is deliberately indifferent if he knows that a prisoner faces a substantial risk of serious harm and fails to take reasonable steps to avoid the harm. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). A prison official may manifest deliberate indifference by “intentionally denying or delaying access to medical care.” *Estelle v. Gamble*, 429 U.S. at 104-05.

“[A] prisoner has no right to choose a specific form of medical treatment,” so long as the treatment provided is reasonable. *Harrison v. Barkley*, 219 F.3d 132, 138-140 (2d Cir. 2000). An inmate’s claims against members of a prison medical department are not viable under § 1983 where the inmate receives continuing care, but believes that more should be done by way of diagnosis and treatment and maintains that options available to medical personnel were not pursued on the inmate’s behalf. *Estelle v. Gamble*, 429 U.S. 97, 107 (1976). Finally, “mere disagreement as to the proper medical treatment” is insufficient to state a constitutional violation. See *Spruill v. Gillis*, 372 F.3d 218, 235 (3d Cir. 2004) (citations omitted).

Prison administrators cannot be deliberately indifferent “simply because they failed to respond directly to the medical complaints of a prisoner who was already being treated by the prison doctor.” *Durmer v. O’Carroll*, 991 F.2d 64, 69 (3d Cir. 1993). “If a prisoner is under the care of medical experts . . . a non-medical prison official will generally be justified in believing that the prisoner is in capable hands.” *Spruill v. Gillis*, 372 F.3d 218, 236 (3d Cir. 2004) (discussing *Durmer*, 991 F.2d at 69). “[A]bsent a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner, a non-medical prison official . . . will not be chargeable with the Eighth Amendment scienter requirement of deliberate indifference.” *Id.* at 236.

On several occasions, plaintiff sent defendants copies of correspondence to others complaining about his medical treatment. Copies sent to defendants were also sent to medical and to Correctional Medical Services, Inc. (“CMS”) administration.<sup>5</sup> Exhibits to the amended complaint indicate that, as recently as one month prior to filing the complaint, plaintiff underwent a scan and saw a physician for evaluation. The exhibits indicate that plaintiff received continual, but what he considered unsatisfactory, medical treatment from CMS. Based upon the alleged facts and the law, the complaint fails to state a cognizable claim against defendants.

Further, exhibits to the amended complaint indicate that, while plaintiff submitted numerous medical grievances and sick call requests, the grievance committee responded to such. Any alleged failure by defendants to respond to plaintiff’s

---

<sup>5</sup>CMS a named defendant, was dismissed for plaintiff’s failure to effect its service. (See D.I. 41)

complaints does not rise to the level of a constitutional violation. See *Brooks v. Beard*, 167 F. App'x 923, 925 (3d Cir. 2006) (not published) (allegations that prison officials and administrators responded inappropriately to inmate's later-filed grievances do not establish the involvement of those officials and administrators in the underlying deprivation); *Durmer v. O'Carroll*, 991 F.2d 64, 69 (3d Cir.1993) (summary judgment properly granted to prison warden and state commissioner of corrections, the only allegation against whom was that they failed to respond to letters from prisoner complaining of prison doctor's treatment decisions).

The amended complaint fails to allege that defendants violated plaintiff's constitutional rights. Therefore, the court will grant the motion to dismiss.

#### **IV. MOTION TO AMEND**

Plaintiff moves to amend and provided to the court a copy of his proposed second amended complaint. (D.I. 29, 38) Defendants oppose the motion and argue that the proposed amendment has little bearing on the pending motion to dismiss. They contend that it fails to identify with any particularity any sort of deliberate indifference on the part of defendants. Finally, they note that plaintiff has been under, and continues to be under, the care of trained medical professionals.

Pursuant to Fed. R. Civ. P. 15(a), a party may amend his pleading once as a matter of course within twenty-one days after serving it or, if the pleading is one to which a responsive pleading is required, twenty-one days after service of a responsive pleading or twenty-one days after service of a Rule 12(b) motion, whichever is earlier. Otherwise, a party may amend his pleading only with the opposing party's written

consent or the court's leave. Rule 15 provides that court should freely give leave to amend when justice so requires.

The Third Circuit has adopted a liberal approach to the amendment of pleadings to ensure that "a particular claim will be decided on the merits rather than on technicalities." *Dole v. Arco Chem. Co.*, 921 F.2d 484, 486-87 (3d Cir. 1990) (citations omitted). Amendment, however, is not automatic. See *Dover Steel Co., Inc. v. Hartford Accident and Indem.*, 151 F.R.D. 570, 574 (E.D. Pa. 1993). Leave to amend should be granted absent a showing of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962); See also *Oran v. Stafford*, 226 F.3d 275, 291 (3d Cir. 2000). Futility of amendment occurs when the complaint, as amended, does not state a claim upon which relief can be granted. See *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997). If the proposed amendment "is frivolous or advances a claim or defense that is legally insufficient on its face, the court may deny leave to amend." *Harrison Beverage Co. v. Dribeck Importers, Inc.*, 133 F.R.D. 463, 468 (D.N.J. 1990).

The proposed second amended complaint provides more detail than the original complaint and amended complaint. It alleges that, during all relevant times, defendants refused to act appropriately, even though they were aware that plaintiff was receiving inadequate medical care, following their receipt of letters from the American Civil Liberties Union because of an investigation by the United States Department of Justice into medical service provided to Delaware Department of Correction inmates. The

proposed amended complaint provides a chronology of plaintiff's medical condition and treatment that includes examinations by physicians and surgeries on April 8, 2008, July 31, 2008, and in February 2010 following plaintiff's continual complaints of pain.

Despite the added facts, the proposed second amended complaint fails to state a claim against defendants. The allegations indicate that plaintiff received medical treatment for his condition, and fail to allege that defendants had any personal involvement or were deliberately indifferent to plaintiff's medical needs. After reviewing the proposed second amended complaint, the court concludes that amendment is futile. For the above reasons, the court will deny plaintiff's motions to amend.

## **V. CONCLUSION**

For the reasons discussed above, the court will grant defendant's motion to dismiss and will deny plaintiff's motions to amend. (D.I. 24, 29, 38) An appropriate order will be entered.